Supreme Court, U.S.
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No. 10-450

In the Supreme Court of the United States

In re TIG Specialty Insurance Company,
Petitioner,

v.

U.S. District Court for the District of Oregon
Respondent.

The Regence Group, Regence BlueShield, Regence BlueCross BlueShield of Oregon, Regence BlueShield of Idaho, and Regence BlueCross BlueShield of Utah
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI AND/OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly denied mandamus relief to petitioner in connection with the district court's factual determination that any purported privilege that may have applied to documents was waived when petitioner disclosed the documents to opponents in adversarial arbitration proceedings?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondents/Real Parties in Interest Regence BlueShield, Regence BlueCross BlueShield of Oregon, Regence BlueShield of Idaho, and Regence BlueCross BlueShield of Utah state that they are nonprofit corporations in Washington, Oregon, Idaho, and Utah, respectively. The sole member of each is respondent the Regence Group, a non-profit, non-insurer holding company organized under the laws of the state of Oregon. None of respondents issue publicly-traded stock.

TABLE OF CONTENTS

OPINIONS BELOW 1

COUNTERSTATEMENT OF THE CASE 1

A. The Instant Lawsuit and Petitioner's Refusal to Provide Insurance Coverage to Respondents 1

B. Petitioner and Its Reinsurers Disputed the Existence of Reinsurance Coverage for Respondents' Claims 2

C. Respondents Sought Discovery of Information Exchanged With the Reinsurers 3

D. The Lower Court Decisions 6

REASONS FOR DENYING THE PETITION 8

I. THE POSTURE OF THE CASE MAKES IT UNSUITABLE FOR THIS COURT'S REVIEW 9

A. The Petition is Interlocutory 9

B. Additional Infirmities Render this Case Unsuitable for This Court's Review 13

II. THE LOWER COURT CORRECTLY APPLIED SETTLED PRINICIPLES IN ORDERING DISCLOSURE OF THE MATERIALS AT ISSUE 16

A. Any Privilege or Protection Has Been Waived 16

B. Petitioner's Reliance on Federal District Court Cases is Unavailing 20

III. NO SPLIT EXISTS AMONG THE FEDERAL APPELLATE COURTS 21

A. Evidentiary Rulings from the Temporary Emergency Court of Appeals are Not Binding Upon Any Court 22

B. The Other Circuit Court Decisions Cited by Petitioner Are Distinguishable Because They Did Not Involve Disclosure to an Adversary 23

IV. PETITIONER DOES NOT SUPPORT ITS CLAIM FOR MANDAMUS RELIEF WITH SUBSTANTIVE ARGUMENT 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

AIU Ins. Co. v. TIG Ins. Co., 2008 U.S. Dist. LEXIS 96693 (S.D.N.Y. Nov. 25, 2008) 20

Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 152 F.R.D. 132 (N.D. Ill. 1993) 13, 15

Am. Colloid Co. v. Old Republic Ins. Co., 1993 WL 222678 (N.D. Ill. June 21, 1993) 13

Am. Constr. v. Jacksonville, T.&K. W.R. Co., 148 U.S. 372 (1893) 9-10

Am. Prot. Ins. Co. v. MGM Grand Hotel-Las Vegas, 1983 U.S. Dist. LEXIS 16423 (D. Nev. June 7, 1983) 13, 24

Austin Municipal Secs., Inc., v. Nat'l Assoc. of Secs. Dealers, Inc., 757 F.2d 676 (5th Cir. 1985) 17-18

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953) 25

B'hood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co., 389 U.S. 327 (1967) 9

Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002) 15

Church of Scientology v. United States, 506 U.S. 9 (1992) 12

In re Chrysler Motors Corp. Overnight Evaluation, 860 F.2d 844 (8th Cir. 1988).....17

City of Sterling Heights v. United Nat'l Ins. Co., 2005 WL 5955828 (E.D. Mich. June 30, 2005)....21

Conway v. Cal. Adult Author., 396 U.S. 107 (1969).....15

Cooper Indus. v. Aviall Servs., 543 U.S. 157 (2004).....16

DTD Enterprises v. Wells, 130 S. Ct. 7 (2009).....9

In re Doe, 662 F.2d 1073 (4th Cir. 1981) 23

Employer Reins. Corp. v. Laurier Indem. Co., 2006 WL 532113 (M.D. Fla. Mar. 3, 2006)..... 21

Front Royal Ins. Co. v. Gold Players, Inc., 187 F.R.D. 252 (W.D. Va. 1999)..... 13, 15

In re Grand Jury (Impounded), 138 F.3d 978 (3d Cir. 1998) 19

In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990)..... 22, 23

Griffith v. Davis, 161 F.R.D. 687 (C.D. Cal. 1995)...17

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)..... 10

Harter v. Iowa Grain Co., 1998 U.S. Dist. LEXIS 22855 (D.D.C. May 12, 1998), *vacated as moot on other grounds*, 1998 U.S. App. LEXIS 28491 (D.C. Cir. Oct. 28, 1998) 18

Hickman v. Taylor, 329 U.S. 495 (1947) 17

In re Honeywell Int'l Secs. Litig., 230 F.R.D. 293 (S.D.N.Y. 2003) 15

Hoechst Celanese Corp. v. Nat. U. Fire Ins. Co., 623 A.2d 1099 (Del. Super. 1991) 14

In re Impounded Case (Law Firm), 879 F.2d 1215 (3d Cir. 1989) 12

Jade Trading, LLC v. United States, 65 Fed. Cl. 487 (2005), *aff'd in part, rev'd in part, vacated in part on other grounds*, 598 F.3d 1372 (Fed. Cir. 2010) 22

John B. v. Goetz, 2010 U.S. Dist. LEXIS 8821 (M.D. Tenn. Jan. 28, 2010) 15

Kerr v. United States, 426 U.S. 394 (1976) 26

Kingsway Fin. Servs. v. PriceWaterhouse-Coopers LLP, 2008 U.S. Dist. LEXIS 77018 (S.D.N.Y. Oct. 2, 2008) 13

Marriott Int'l Resorts, L.P. v. United States, 61 Fed. Cl. 411 (2004), *rev'd on other grounds*, 437 F.3d 1302 (Fed. Cir. 2006) 22

Mass. Bay Ins. Co. v. Stamm, 700 N.Y.S.2d 707, 708 (App. Div. 2000) 14

McLean v. Cont. Cas. Co., 1996 WL 684209 (S.D.N.Y. Nov. 21, 1996) 13

Minn. Sch. Board Association Ins. Trust v. Employers Insurance Co. of Wausau, 183 F.R.D. 627 (N.D. Ill. 1991) 21

Mohawk Industrial Inc. v. Carpenter, 130 S. Ct. 599 (2009) 10, 11, 12, 13, 25

Nat. U. Fire Ins. Co. v. Cont. Ill. Corp., 116 F.R.D. 78 (N.D. Ill. 1987) 13

Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269 (D.D.C. 2002) 17

N River Ins. Co. v. Columbia Cas. Co., 1995 WL 5792 (S.D.N.Y. Jan. 5, 1995) 20

Omaha v. Omaha Water Co., 218 U.S. 180 (1910) ... 17

In re Outsidewall Tire Litig., 267 F.R.D. 466 (E.D. Va. 2010) 19

Owens Corning Fiberglas Corp. v. Allstate Ins. Co., 660 N.E.2d 765 (Ohio C.P. 1993) 14

Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981) 17

Posters N' Things, Ltd. v. United States, 511 U.S. 513 (1994) 25

Reliance Ins. Co. v. Am. Lintex Corp., 2001 U.S. Dist. LEXIS 7140 (S.D.N.Y. June 1, 2001) 13

Roberts v. U.S.D.C., 339 U.S. 844 (1950) 25

Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987)..... 14

Springwell Corp. v. Falcon Drilling Co., 1998 U.S. Dist. LEXIS 19455 (S.D.N.Y. June 30, 1998) 14

Stonewall Ins. Co. v. National Gypsum Co., 1988 WL 96159 (S.D.N.Y. Sept. 6, 1988) 13

Tex. Am. Oil Corp. v. D.O.E., 44 F.3d 1557 (Fed. Cir. 1995)..... 22

Texas v. Hopwood, 518 U.S. 1033 (1996).....10

Ticor Title Ins. Co. v. Brown, 511 U.S., 117 (1994)..15

U.S. Fire Ins. Co. v. General Reins. Corp., 1989 WL 82415 (S.D.N.Y. July 20, 1989)..... 21

United States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980)..... 22, 23, 24

United States v. Evans, 113 F.3d 1457 (7th Cir. 1997)..... 23

United States v. Gulf Oil Corp., 760 F.2d 292 (TECA 1985)..... 22, 24, 25

United States v. Miller, 14 F.3d 761 (2d Cir. 1994) 13

United States v. Nobles, 422 U.S. 225 (1975)..... 16, 19

Va. Military Institute v. United States,
508 U.S. 946 (1993)..... 9

Westinghouse Elec. Corp. v. Rep. of the Philippines,
951 F.2d 1414 (3d Cir. 1991)..... 17

Will v. United States, 389 U.S. 90 (1967)..... 25

Young v. Liberty Mutual Ins. Co.,
1999 WL 301688 (D. Conn. Feb. 16, 1999)..... 13

MISCELLANEOUS

Fletcher, Arbitrating Securities Disputes (2005).... 18

Lodder & Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*,
10 Harv. Negotiation L. Rev. 287 (2005)..... 18

Note, *Preserving Collective-Action Rights in Employment Arbitration*,
91 Va. L. Rev. 823 (2005)..... 18

8 Wright, Miller, & Marcus, FEDERAL PRACTICE & PROCEDURE *Civil* (3d) § 2024 (2010)..... 16

OPINIONS BELOW

In addition to the opinions set forth in the petition (Pet. 1), the District Court's February 4, 2010 order denying reconsideration of petitioner's request for a protective order may be accessed at *Regence Group v. TIG Specialty Ins. Co.*, 2010 U.S. Dist. LEXIS 9840 (D. Or. Feb. 4, 2010).

COUNTERSTATEMENT OF THE CASE

A. The Instant Lawsuit and Petitioner's Refusal to Provide Insurance Coverage to Respondents

This case involves a dispute over insurance coverage. CA9 App. 233. Respondents sued petitioner for breach of contract, declaratory relief, breach of the duty of good faith and fair dealing, fraudulent misrepresentation, fraud in the inducement, and bad faith. Respondents seek, among other things, a declaration that petitioner is obligated to pay defense and indemnity costs related to three lawsuits (two in Florida, one in Washington state) in which respondents were named as defendants.[1]

The Florida lawsuits asserted RICO claims. The Washington lawsuit alleged similar claims under state law. One lawsuit (*Thomas*) has settled, and the other two were dismissed.

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[1] The underlying actions are *Tacoma Orthopaedic Surgeons, et al. v. Regence BlueShield, et al.*, No. 02 2 05982 7 (Wash. Super. filed Mar. 22, 2002); *Thomas, et al. v. BlueCross and BlueShield Ass'n*, 03-21296 (S.D. Fla. filed May 22, 2003) ("*Thomas*"); and *Solomon v. BlueCross and Blue Shield Ass'n*, No. 03-22935 (S.D. Fla. filed Dec. 2003).

Respondents purchased "Managed Care Organization Liability" insurance from petitioner. As part of the coverage, petitioner sold respondents coverage for RICO claims, and charged respondents an extra premium for the coverage.

When the first lawsuit (Washington) was filed, petitioner agreed to provide full coverage to respondents without reservation. *See Regence Group v. TIG Specialty Ins. Co.*, 2008 U.S. Dist. LEXIS 62731 at *5 (D. Or. Aug. 12, 2008). After the other two lawsuits were filed, petitioner refused to provide full coverage. *See id.*

Respondents filed suit in 2004 to obtain full coverage. The suit settled shortly thereafter. *See id.* In 2007, petitioner refused to cover, among other things, the settlement in *Thomas*. Respondents filed this action later that year.

B. Petitioner and Its Reinsurers Disputed the Existence of Reinsurance Coverage for Respondents' Claims

Petitioner purchased separate reinsurance policies from Swiss Reinsurance America Corporation ("Swiss Re"), and Munich Reinsurance America, Inc., f/k/a American Re-Insurance Company ("Munich Re") for claims made, *inter alia*, under the insurance policy sold to respondents. While the three underlying lawsuits were pending, petitioner submitted claims to its reinsurers seeking reimbursement for sums petitioner spent and would spend responding to the claims.

The reinsurers initiated two separate arbitration proceedings against petitioner to resolve the disputes regarding whether its reinsurance

policies covered a number of different claims. The three lawsuits against respondents were among those at issue in the arbitrations. CA9 App. 233.

Petitioner repeatedly attempts to downplay the adversarial nature of the arbitrations. *E.g.*, Pet. 3, 4, 10, 11, 14-15, 25. However, petitioner candidly acknowledges the "disputes" (*id.* at 10) and "disagreement" (*id.* at 12) between it and its reinsurers. Petitioner states without any citation that the arbitrations were about allocation of coverage. *Id.* at 10, 11, 12. The reinsurance arbitrations were about, among other things, the reinsurers' position that their policies did not cover respondents' claims.

Ultimately petitioner and its reinsurers settled their disputes that included petitioner's claims for coverage for the actions against respondents, and the reinsurers paid petitioner sums in settlement. *See* Dist. Ct. Doc. 189 at 10; Dist. Ct. Doc. 260 at 9-10; Dist. Ct. Doc. 263 at 9-10.

C. Respondents Sought Discovery of Information Exchanged With the Reinsurers

In the course of this litigation, respondents served document requests on petitioner seeking, among other things, communications with reinsurers about coverage for the lawsuits asserted against respondents. CA9 App. 233-34. Petitioner objected and refused to produce any reinsurance agreements, any communication with the reinsurers, or any reinsurance documents at all. CA9 App. 145, ¶5.

Respondents also served subpoenas on Swiss Re, Munich Re, and the law firm that represented

petitioner in both arbitrations, Rubin, Fiorella & Friedman. CA9 App. at 234. Those parties refused to produce any reinsurance documents. The reinsurers claimed the documents were protected by confidentiality orders or agreements in the reinsurance arbitrations (*id.* 145-46, ¶8), even though those orders or agreements expressly allowed disclosure of materials in response to subpoenas. Dist. Ct. Doc. 186 at 6, n.9.

While negotiations about the subpoenas were ongoing (in which petitioner participated), petitioner filed a motion in the district court seeking a protective order with respect to the information respondents sought. The third parties likewise filed motions resisting disclosure.

Of the three privilege logs that petitioner produced at the time of the briefing in the district court, petitioner referred to reinsurance with respect to only 30 documents. Dist. Ct. Doc. 151 at 8.[2] All 30 documents were withheld as "Confidential Proprietary Business Information" and 24 were also withheld on the basis of attorney/client privilege. *Id.* Petitioner did not list a single document as withheld on the basis of work-product privilege. *Id.*

Respondents contended that the subpoenaed information was reasonably calculated to lead to the discovery of admissible evidence for multiple reasons. For example, the requested documents were related to positions petitioner took with its reinsurers in the ordinary course of business and in

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[2] Petitioner later supplemented its logs after the briefing in the district court was complete.

arbitrations to secure payments for respondents' claims.

In the arbitrations, petitioner necessarily asserted that respondents' claims were valid, covered claims that petitioner ultimately would be required to have to pay. In other words, at the same time petitioner was telling respondents there was no coverage for their claims, petitioner was asserting to its reinsurers that its policy in fact covered respondents' claims. For this reason, the documents were particularly relevant to respondents' breach of contract and bad faith claims in the instant action.

Moreover, petitioner did not dispute that its settlement with the reinsurers included payments that partially represented recovery for respondents' claims under the policy. Dist. Ct. Doc. 151 at 5. Information regarding reimbursement received by petitioner in order to pay respondents' claims for coverage is clearly reasonably calculated to the discovery of admissible evidence in respondents' lawsuit against petitioner.

Respondents also have alleged counts for fraudulent misrepresentations and fraud in the inducement based on petitioner's denial of coverage for RICO claims, even though petitioner amended the policy and sold respondents coverage for RICO claims at an extra premium. Information petitioner conveyed to the reinsurers about RICO coverage is undoubtedly relevant to these issues.

Finally, reinsurance information may demonstrate petitioner's financial motive to act in bad faith in connection with respondents' claims for coverage. Based upon annual reports from petitioner's corporate parent, petitioner appeared to

be in financial distress at the time it refused to provide full coverage for respondents' claims. Such distress was apparent in part because petitioner was in runoff as of 2002 and, by December 31, 2004, already had submitted reinsurance claims equal to the $1 billion in "corporate insurance cover" the petitioner's parent had purchased from Swiss Re. It appears that various reinsurance commutations, including commutation of the $1 billion cover from Swiss Re were given to petitioner in order to improve petitioner's cash flow and balance sheet.[3] Such evidence of secret cash flow stresses (hidden by more optimistic financial reports which later had to be restated), caused in part by inadequate reserving of claims such as respondents', would tend to prove that petitioner had an incentive to deny or delay paying respondent's valid claims for insurance for improper reasons.

D. The Lower Court Decisions

In denying petitioner's (and its reinsurers) requests for protective orders, the district court agreed that the information sought by respondents was discoverable:

> Such discovery, limited in scope as described by Regence, is undoubtedly relevant or likely to lead to admissible evidence[.] . . . For example, the discovery might lead to evidence that could include admissions, be used for impeachment purposes on the question of whether defendant denied the existence of coverage, or pertain to [respondents'] fraud claims, motives that might suggest the

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[3] Excerpts from the reports are at Dist. Ct. Doc. 152, Ex. M.

> defendant acted in bad faith, and flaws in defendant's asserted defenses.

Pet. App. 23a.

Contrary to the repeated insinuations in the petition (*e.g.*, Pet 2, 3, 11), the district court never decided that any material was privileged—let alone under the work product doctrine. Instead, the district court held that *if* any privilege existed, it had been waived because the information had been disclosed in the adversarial arbitration proceedings. *See* Pet. App. 23a-24a.[4]

The district court subsequently denied reconsideration because petitioner's "motion provides no basis for altering the court's conclusion that the scope of the discovery is reasonable and proper." *Id.* at 10a-11a. The district court reiterated its prior conclusion—even if any privilege existed, it was waived by disclosure in the arbitrations. *Id.* at 10a. The district court further noted that respondents "have demonstrated consistent willingness to abide by confidentiality requests and to agree to reasonable protective orders. [Petitioner's] renewed concerns about confidentiality is [sic] no basis for delaying the production of non-privileged discovery or refusing to negotiate appropriate protective orders with opposing counsel in good faith." *Id.* at 12a.

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[4] After the district court in this case ordered production of the material at issue, the reinsurers initiated proceedings in the United States District Courts for the Southern District of New York and New Jersey seeking to quash the subpoenas issued in this case. The district court has sanctioned the reinsurers and awarded fees to respondents for these collateral attacks on its orders. *See* Dist. Ct. Doc. 473.

Petitioner filed a petition for a writ of mandamus in the court of appeals, which denied the petition without substantive comment, and without calling for a response from respondents. *Id.* at 1a. The Ninth Circuit denied petitioner's request for rehearing and rehearing en banc again without substantive comment, and again without calling for a response from respondents. *Id.* at 26a.

In the meantime, petitioner sought a stay of discovery from the district court while it exhausted its appellate remedies including to this Court. The district court denied the stay, and ordered petitioner to produce the relevant documents by October 15, 2010. Dist. Ct. Doc. 475. Petitioners moved for reconsideration of the denial of the stay. On October 15, 2010, petitioner produced certain material previously withheld and claims to have produced all of the documents that are subject to this petition. Petitioner's motion for reconsideration is still pending in the district court.

REASONS FOR DENYING THE PETITION

The decision below presents no issue warranting interlocutory review by this Court. In response to the district court's order, petitioner claims to have produced all of the material at issue. Therefore, the portion of the petition that seeks to prevent disclosure is moot. If petitioner wishes, it can seek its appellate remedies after final judgment.

A plethora of additional infirmities render this case especially unsuitable for this Court's review at this procedural juncture of the case. The district court did not determine that the material at issue was protected by the work product doctrine. Rather, the district court stated that if material was

protected, any privilege was waived. This Court will not review issues premised upon hypothetical underpinnings.

If any privilege existed here, the Ninth Circuit applied settled principles of law to the particular facts of this case. To the extent the work product doctrine applies, this case involves the very specific situation of a party disclosing purportedly confidential information to opponents in adversarial proceedings. The result does not conflict with any decision of this Court or of any other federal appellate court. There is no merit to petitioner's contentions that the decision below is contrary to the great weight of authority, or has created a conflict among the federal appellate courts. No decision cited in the petition even remotely suggests disharmony with the lower courts in such circumstances.

Finally, petitioner has abandoned any claim for mandamus relief by not providing any substantive discussion as to why it is entitled to the writ in its petition.

I. THE POSTURE OF THE CASE MAKES IT UNSUITABLE FOR THIS COURT'S REVIEW

A. The Petition is Interlocutory

The petition seeks review of an interlocutory order. This Court has traditionally preferred to "await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.,

respecting the denial of certiorari).[5] Not only does this policy promote judicial economy by discouraging piecemeal litigation, but it also ensures that this Court will decide real issues in concrete settings. *See Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting the denial of certiorari) (because this Court "reviews judgments, not opinions," it should "await a final judgment on a program genuinely in controversy").

The petition barely acknowledges the interlocutory posture of the case. Rather, it attempts to turn the Court's historical reluctance to review interlocutory orders on its head by contending that the interlocutory nature of this appeal somehow *favors* review at this juncture. *See* Pet. 24 n.9 (citing *Mohawk Indus. Inc. v. Carpenter*, 130 S.Ct. 599 (2009)). Contrary to petitioner's assertions, *Mohawk* unquestionably affirmed this Court's preference to review final judgments, as opposed to interlocutory orders.

Mohawk involved a substantially similar procedural posture. In *Mohawk*, the respondent filed a complaint against his employer (the petitioner) alleging civil rights violations. The petitioner had already been sued by a class of undocumented workers for labor and racketeering violations. *See*

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[5] *See also DTD Enters. v. Wells*, 130 S. Ct. 7, 8 (2009) (Kennedy, J. joined by Roberts, C.J., and Sotomayor, J.) (concurring in denial of certiorari because "the petition is interlocutory"); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Am. Constr. Co. v. Jacksonville, T. & K. W.R. Co.*, 148 U.S. 372, 384 (1893). The interlocutory nature of the order below "alone furnishes sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

130 S.Ct. at 603. When the lawyers for the class became aware of respondent's lawsuit, they sought an evidentiary hearing to explore the merits of respondent's claims. *Id.* At that hearing, petitioner contended that, upon investigating respondent's allegations by company counsel, the allegations were deemed completely false and without merit. *Id.* at 603-04.

Meanwhile, the *Mohawk* respondent sought discovery in his own lawsuit regarding the company's investigation of his claims. *Id.* at 604. Much like petitioner here, the *Mohawk* petitioner contended that such evidence was protected by the attorney-client privilege. Just like the district court in this case, the district court in *Mohawk* held that any privilege was waived when petitioner revealed the substance of the communications in the class lawsuit, and ordered production. *See id.* The Eleventh Circuit dismissed the appeal as an improper collateral appeal, and denied the alternative request for mandamus relief. *See id.*

This Court granted certiorari to resolve a circuit conflict "concerning the availability of collateral appeals in the attorney-client privilege context." *Id.* The Court determined that waiting until final judgment to review discovery orders rejecting assertions of attorney-client privilege does not "imperil[] the interest [of confidentiality] as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* at 606. In so holding, this Court considered and rejected the same essential argument that petitioner makes here:

> In our estimation, postjudgment appeals generally suffice to protect the rights of

> litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.
>
> Dismissing such relief as inadequate, Mohawk emphasizes that the attorney-client privilege does not merely "prohibi[t] use of protected information at trial"; it provides a "right not to disclose the privileged information in the first place." [cit.] Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications. But deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.

Id. at 606-07. The same principles that this Court held applicable to the attorney-client privilege should also apply to the qualified work product doctrine. *Cf. In re Impounded Case (Law Firm)*, 879 F.2d 1215, 1213-14 (3d Cir. 1989) (same legal principles generally apply to both the attorney client privilege and the work product doctrine).

Also, as discussed *supra* at 8, petitioner claims to have produced the material at issue on October 15, 2010 in response to an order by the district court. Although this Court has held that compliance with an order to produce documents does not necessarily moot a pending appeal challenging discovery because the higher court can order that the produced

documents returned and any copies destroyed (*Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)), petitioners do not request such relief from this Court, nor have they requested it from the district court. Rather, petitioner seeks an interlocutory order to prevent disclosure. *E.g.*, Pet. 13-14, 21-26. Since that particular relief is no longer available, the claimed grievance cannot be remedied, and the petition is moot. *Cf. United States v. Miller*, 14 F.3d 761, 764 (2d Cir. 1994) ("[T]he 'cat is out of the bag' so to speak, and there is no way the trial court or this Court can put it back in"). If petitioner wishes, it can seek review of the underlying issue (*i.e.*, whether disclosure was proper) on appeal from a final judgment. *See Mohawk*, 130 S.Ct. at 606-07.

B. Additional Infirmities Render this Case Unsuitable for This Court's Review

The factual record in this case offers a fitting example of why the rejection of interlocutory review is exactly correct. Courts routinely compel production of reinsurance information in insurance coverage litigation.[6] In discovery disputes, the party

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[6] For a sampling of such cases, *see, e.g.*, *Kingsway Fin. Servs. v. Pricewaterhouse-Coopers LLP*, 2008 U.S. Dist. LEXIS 77018, at *12 (S.D.N.Y. Oct. 2, 2008); *Reliance Ins. Co. v. Am. Lintex Corp.*, 2001 U.S. Dist. LEXIS 7140, at **10-11 (S.D.N.Y. June 1, 2001) ("While their commercial interests coincide, to some extent, no evidence has been proffered that establishes that Reliance and its reinsurer share the same counsel or coordinate legal strategy in any way"); *Young v. Liberty Mut. Ins. Co.*, 1999 WL 301688 at *1, *7 (D. Conn. Feb. 16, 1999); *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 258 (W.D. Va. 1999); (rejecting objections based on common interest doctrine); *McLean v. Cont. Cas. Co.*, 1996 WL 684209 at *1 (S.D.N.Y. Nov. 21, 1996) (same); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 139-42 (N.D. Ill. 1993) (rejecting objections based on attorney client and work product doctrine); *Am.*

asserting work product protection has the burden of establishing that work product applies. *See, e.g., Springwell Corp. v. Falcon Drilling Co.*, 1998 U.S. Dist. LEXIS 19455, at *2 (S.D.N.Y. June 30, 1998) (Sotomayor, J.). In this case, many of the documents sought (*e.g.*, ordinary claims documents, the reinsurance policies, submissions in the arbitrations, and notices to reinsurers) simply are not privileged at all—let alone protected by the work product doctrine. Rather, these documents were prepared in the ordinary course of business and, therefore, do not come within the work product doctrine. *See, e.g., Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (citing numerous authorities).

More importantly, the petition's underlying premise—that some subset of the information at issue is protected by the work product doctrine—is entirely hypothetical.[7] The district court *assumed* that if any documents were protected by the qualified

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Colloid Co. v. Old Republic Ins. Co., 1993 WL 222678 at *1-3 (N.D. Ill. June 21, 1993); *Stonewall Ins. Co. v. Nat'l Gypsum Co.*, 1988 WL 96159 at **5-6 (S.D.N.Y. Sept. 6, 1988); *Nat'l U. Fire Ins. Co. v. Cont. Ill. Corp.*, 116 F.R.D. 78, 83-85 (N.D. Ill. 1987); *Am. Protection Ins. Co. v. MGM Grand Hotel-Las Vegas*, 1983 U.S. Dist. LEXIS 16423, at **15-16 (D. Nev. June 7, 1983) (rejecting objections based on attorney client and work product doctrine); *Mass. Bay Ins. Co. v. Stamm*, 700 N.Y.S.2d 707, 708 (App. Div. 2000) (same and citing additional authorities); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 623 A.2d 1099, 1107-08 (Del. Super. 1991) (citing additional authorities); *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 768 (Ohio C.P. 1993). These decisions belie the overblown apocalyptic concerns proferred by petitioner and the opinions of private practitioners who regularly represent insurance and reinsurance companies. Pet. 20-25.

[7] Petitioner does not dispute that the information sought by respondents is relevant. *See supra* at 4-6.

work product doctrine, the privilege was waived. The court did not decide whether the documents were actually subject to the work product doctrine. Pet. 10a, 23a-24a. This Court will not review questions that are premised upon hypothetical underpinnings. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S., 117, 122 (1994); *Conway v. Cal. Adult Author.*, 396 U.S. 107, 110 (1969). Had the district court addressed the issue of whether specific documents were subject to the work product doctrine, it very likely would have resolved the question in the negative.

Underscoring the dubious proposition that any material was protected by work product, petitioner never claimed work product protection in its privilege logs in connection with any entry mentioning reinsurance until *after* briefing in the district court was closed. *See supra* at 7. A failure to assert a privilege in a log generally waives any claim to that privilege. *See, e.g., John B. v. Goetz*, 2010 U.S. Dist. LEXIS 8821, at **271-72 (M.D. Tenn. Jan. 28, 2010) (citing numerous decisions); *In re Honeywell Int'l Secs. Litig.*, 230 F.R.D. 293, 299 (S.D.N.Y. 2003) (same).

The "common interest" doctrine also is inapplicable due to petitioner's failure to establish a work product basis for withholding the documents. That privilege only applies when the material was already protected by some other privilege. *See, e.g., Cavallaro v. United States*, 284 F.3d 236, 249-50 (1st Cir. 2002). Because petitioner never established that the work product doctrine applies in the district court, the common interest doctrine is entirely irrelevant here. *See, e.g., Front Royal*, 187 F.R.D. at 258; *Allendale*, 152 F.R.D. at 140-41.

Finally, petitioner did not argue to the Ninth Circuit the question presented to this Court. Here, petitioner contends that it did not waive work product protections when it "shares such materials with a reinsurer with which it has a substantial but not a perfect alignment of interests." Pet. i. Yet in its "issues presented" to the Ninth Circuit, petitioner argued no waiver because it disclosed the materials "to its reinsurers as part of its normal course of business" and "in response to an order compelling it to do so as part of a confidential reinsurance arbitration." TIG's Ninth Circuit Petition at 10. This Court ordinarily does not decide questions that were not presented below. *See, e.g., Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 168 (2004). There is no reason to do so here.

II. THE LOWER COURT CORRECTLY APPLIED SETTLED PRINICIPLES IN ORDERING DISCLOSURE OF THE MATERIALS AT ISSUE

A. Any Privilege or Protection Has Been Waived

In this case, the district court held that any applicable privilege was waived, and petitioner still fails to show that the lower court's decision was erroneous. Work product protection "is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles,* 422 U.S. 225, 239 (1975). Disclosure of otherwise privileged information to an adverse party waives any claim of privilege. *See id.*; *see also* 8 Wright, Miller, & Marcus, FEDERAL PRACTICE & PROCEDURE *Civil* (3d) § 2024 at 530 (2010).

Generally speaking, disclosure to an opponent in an adversarial proceeding waives any work product privilege in future lawsuits against another party, even if such documents were subject to a confidentiality and protective order providing that the production of such documents would not constitute a waiver of any privilege or protection. *See, e.g., Navajo Nation v. Peabody Holding Co.*, 209 F. Supp.2d 269, 286-88 (D.D.C. 2002) (citing *Hickman v. Taylor*, 329 U.S. 495, 509-12 (1947)).[8] As the United States Court of Appeals for the District of Columbia Circuit put it, "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

Such is precisely the case here. Petitioner claims that it shared purportedly protected materials with its reinsurers to ostensibly evaluate whether respondents' claims were covered after the reinsurers initiated arbitration proceedings denying any coverage existed. Yet petitioner has improperly "resurrected the claim of confidentiality" against

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[8] *See also Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (rejecting argument that disclosures made pursuant to a confidentiality agreement immunizes against waiver); *In re Chrysler Motors Corp. Overnight Evaluation*, 860 F.2d 844, 846-47 (8th Cir. 1988) (same); *Griffith v. Davis*, 161 F.R.D. 687, 699-700 (C.D. Cal. 1995) ("waiver occurs despite any agreement by the parties that the information disclosed will remain confidential as against the rest of the world").

respondents in the instant lawsuit over the same materials.

Arbitration proceedings are inherently adversarial. *See, e.g., Omaha v. Omaha Water Co.*, 218 U.S. 180, 195 (1910); *Austin Mun. Secs., Inc., v. Nat'l Assoc. of Secs. Dealers, Inc.*, 757 F.2d 676, 691 (5th Cir. 1985); *Harter v. Iowa Grain Co.*, 1998 U.S. Dist. LEXIS 22855, at **4-5 (D.D.C. May 12, 1998), *vacated as moot on other grounds*, 1998 U.S. App. LEXIS 28491 (D.C. Cir. Oct. 28, 1998).[9] This case presents no exception. Petitioner and its reinsurers plainly took conflicting and opposing positions as to whether coverage existed for the claims at issue. Petitioner repeatedly attempts to downplay the adversarial nature of the arbitrations. *E.g.*, Pet. 3, 4, 10, 11, 14-15, 25. Without citation, petitioner asserts that the arbitrations were solely about allocation. *Id.* at 10, 11, 12. However, petitioner candidly acknowledges the "disputes" (*id.* at 10) and "disagreement" (*id.* at 12) between itself and its reinsurers regarding coverage, and the petition's question presented acknowledges adversity existed

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[9] *See also* Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOTIATION L. REV. 287, 296 (2005) ("Arbitration is an adversarial procedure in which an independent third party decides the case"); C. Edward Fletcher, ARBITRATING SECURITIES DISPUTES (1990) at 848-49 ("Much like litigation, arbitration is characterized by trial-like adversarial confrontation, but it is conducted privately and employs more relaxed rules of evidence and procedure than litigation"); Note, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823, 856 (2005) (rejecting analogy between arbitration and settlement as "unsatisfactory, because arbitration results in a third-party decision after an adversarial process").

between the entities. *Id.* at i. The mere fact that *some* common interest among the parties exists is not sufficient to prevent waiver when otherwise confidential information is disclosed to an adversary. *See, e.g., Chrysler Motors Corp,* 860 F.2d at 846-47 (court held work product protection of computer tape produced during settlement negotiation was waived; rejecting contention that pursuit of settlement was a common interest between parties).

Although petitioner claims (Pet. 10) that it was "ordered" to share certain privileged documents with the reinsurers in the arbitration proceedings, the trial court correctly noted that the documents petitioner sought to protect from disclosure also were exchanged with the reinsurers in the ordinary course of business. Pet. App. 8a.[10] Based upon settled principles governing waiver, the lower court also correctly determined that petitioner waived any claim of privilege when it disclosed the relevant information in adversarial arbitration proceedings against its reinsurers.

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[10] Further, to the extent that petitioner asserts the arbitration panels' orders amounted to "compulsion" for disclosure, they were simply a façade manufactured by petitioner to guard against any disclosure in future litigation. *See* Dist. Ct. Doc. 186 at 2, 6. Even if petitioner's disclosures were truly involuntary and made under threat of sanction (which they were not), such would be a factual determination ill-suited for resolution by this Court. *See, e.g., Nobles,* 422 U.S. at 240 n.14 (waiver of work product "depends, of course, on the circumstances"); *In re Grand Jury (Impounded),* 138 F.3d 978, 980-81 (3d Cir. 1998) (waiver of work product reviewed for abuse of discretion); *In re Outsidewall Tire Litig.,* 267 F.R.D. 466, 470 (E.D. Va. 2010) (noting that "most discovery disputes" are of "fact-specific character" and entrusted to the discretion of the trial judge).

B. Petitioner's Reliance on Federal District Court Cases is Unavailing

In support of its dubious assertion (Pet. 15) that a "majority of courts" hold that an insurer and reinsurer do not waive any common interest privileges by sharing information, petitioner cites four district court decisions purporting to support its position. *See id.* at 16-17; *but see supra* at 13 n.5 (citing authorities rejecting privilege claims). A critical issue is whether adversity exists. Adversity is present when insurer and reinsurer institute arbitration proceedings taking opposite positions as to whether coverage exists. *See, e.g., AIU Ins. Co. v. TIG Ins. Co.* 2008 U.S. Dist. LEXIS 96693, at **21-23 (S.D.N.Y. Nov. 25, 2008) (holding that insurer and reinsurer became adversaries when underlying litigation had settled and insurer and reinsurer had to resolve coverage payments between themselves);[11] *North River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792, at **4-5 (S.D.N.Y. Jan. 5, 1995).

The district court cases cited by petitioner (Pet. 16-18) that denied discovery of reinsurance information did not involve situations where (as here) the insurer and reinsurer were adversarial.

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[11] The *AIU v. TIG* case involved another dispute between petitioner and a reinsurer. Petitioner sought production of documents from its reinsurer even though the latter claimed the documents were privileged. Petitioner made—and prevailed with—several arguments that are directly contrary to the positions petitioner is asserting to this Court. *See id.* (petitioner arguing that confidentiality agreement did not preclude disclosure and that it did not have a common interest with its reinsurer). Thus, petitioner's assertions that insurers and reinsurers inherently share coterminous interests (*e.g.*, Pet. 5-7, 21-26) should be viewed with a skeptical eye.

See, e.g., Minn. Sch. Bd. Ass'n Ins. Trust v. Employers Ins. Co. of Wausau, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (no adversary proceeding between the insurer and its reinsurers); *City of Sterling Heights v. United Nat'l Ins. Co.*, 2005 WL 5955828, at *1 (E.D. Mich. June 30, 2005) (same); *Employer Reinsurance Corp. v. Laurier Indem. Co.*, 2006 WL 532113 at *2 (M.D. Fla. Mar. 3, 2006) (same); *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 1989 WL 82415, at *3 (S.D.N.Y. July 20, 1989) (same). Those cases are thus distinguishable.

Moreover, even petitioner's authorities recognize the universal principle that any common interest privilege between insurer and reinsurer dissipates when their interests become adverse. *See Employer Reinsurance*, 2006 WL 532113 at *2 ("If those interests *actually* rather than hypothetically diverge at some point, Plaintiff can renew its motion [to compel]"). Undoubtedly, an arbitration contesting whether coverage exists presents a situation where a reinsurer and ceding insurer's interests "diverge."

III. NO SPLIT EXISTS AMONG THE FEDERAL APPELLATE COURTS

Petitioner is mistaken when it contends that the Ninth Circuit's denial of mandamus conflicts with the decisions of other federal appellate courts.[12]

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[12] Although petitioner's briefs to the district court and Ninth Circuit cited some of the district court opinions that it cites to this Court, those briefs did not cite any of the federal appellate decisions relied upon in the petition to support a "conflict."

A. Evidentiary Rulings from the Temporary Emergency Court of Appeals are Not Binding Upon Any Court

The most repeatedly-cited federal appellate decision in the petition (*United States v. Gulf Oil Corporation*, 760 F.2d 292 (TECA 1985)) cannot serve as a basis for a circuit split. *See* Pet. 3, 18, 19, 21. While the Federal Circuit adopted the decisions of the Temporary Emergency Court of Appeals as precedent after TECA was abolished by Congress (*see Tex. Am. Oil Corp. v. D.O.E.*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc)), it only did so with respect to substantive energy law. *See, e.g., Marriott Int'l Resorts, L.P. v. United States*, 61 Fed. Cl. 411, 418 (2004) (declining to follow TECA precedent in non-energy cases), *rev'd on other grounds*, 437 F.3d 1302 (Fed. Cir. 2006). To the extent that TECA decisions involve procedural or evidentiary rulings, those decisions are not binding on the Federal Circuit—or on any court. *See id.*[13] No Federal Circuit decision has treated TECA's decisions as binding outside of the energy context. Accordingly, *Gulf Oil* does not support petitioner's effort to manufacture a "circuit split."

[13] *See also Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 496 n.25 (2005) ("TECA's rulings on evidentiary privileges are not binding on this Court because the Federal Circuit adopted TECA decisions as precedent only in cases where the Federal Circuit was acting as a successor to TECA"), *aff'd in part, rev'd in part, vacated in part on other grounds*, 598 F.3d 1372 (Fed. Cir. 2010).

B. The Other Circuit Court Decisions Cited by Petitioner Are Distinguishable Because They Did Not Involve Disclosure to an Adversary

There is no substance to petitioner's suggestion that the decision below conflicts with decisions of the Fourth and District of Columbia Circuits. *See* Pet. 18-19 (citing *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d 244 (4th Cir. 1990) and *United States v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980)).

The Fourth Circuit's decision in *Grand Jury Subpoenas* involved an attempt by the government to obtain materials from a wholly-owned subsidiary of a company that allegedly committed the crime of misappropriating proprietary information while performing a contract for the United States Army. *See* 902 F.2d at 245-46. The government contended that the subsidiary had shared the relevant materials with its parent during earlier civil proceedings brought by the corporate parent against the Army for equitable adjustments to the contract. The Fourth Circuit made clear that no privilege had been waived because, at the time, the parent and subsidiary had a common interest in prevailing in the civil action against the Army and that their interests were never antagonistic. *See id.* at 249.

Nothing in the Fourth Circuit's decision even remotely suggests a conflict here. Consistent with the decision below, earlier precedent from the Fourth Circuit has held that any claim of privilege is waived if a party discloses otherwise privileged information to parties with adverse interests. *See In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981). Indeed, the Seventh

Circuit has distinguished the Fourth Circuit's decision in *Grand Jury Subpoena* specifically on the basis that it involved parties who were pursuing a joint, nonadversarial interest at the time of the disclosures. *See United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997).

The District of Columbia Circuit's decision in *AT&T* is likewise of no avail to petitioner. That case involved two separate lawsuits by the government and MCI against AT&T. At no point were the government's and MCI's interests ever antagonistic. Hence, there was no waiver of privilege. *See* 642 F.2d at 1300.

The situation in *AT&T* is not even remotely factually analogous to the instant situation. Indeed, some courts have cited the District of Columbia Circuit's *AT&T* decision in holding that information shared by insurers and reinsurers is not protected by any privilege. *See, e.g., Am. Protection*, 1983 U.S. Dist. LEXIS 16423, at **15-16 (insurer waived privilege by sharing information with reinsurer; *citing AT&T*).

Likewise, even if the TECA's decision in *Gulf Oil* were binding upon any court (and it is not), it is distinguishable here for the same reasons. *Gulf Oil* involved two entities that shared documents when they were contemplating a corporate merger that ultimately proved unsuccessful. The TECA expressly predicated its decision that there was no waiver of work product on the fact that the parties in that case "were obviously not adversaries at the time of the disclosure." 760 F.2d at 296. Rather, the parties "were in the initial stages of becoming parent and subsidiary. Consequently, Gulf had a legitimate,

nonadversarial, interest in reviewing Cities' work product generated in connection with the declaratory judgment." *Id.* Here, petitioner and its reinsurers were clearly in adversarial proceedings.

IV. PETITIONER DOES NOT SUPPORT ITS CLAIM FOR MANDAMUS RELIEF WITH SUBSTANTIVE ARGUMENT

Although entitled "Petition for Writ of Certiorari And/Or Mandamus," the petition makes no substantive argument or even reference to a claim for mandamus relief. It makes no attempt to fulfill the substantive requirements of Rule 20, even though it is petitioner's burden to show that "its right to issuance of the writ is clear and indisputable." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quotation omitted). Moreover, the petition's conclusion makes no reference to mandamus relief. Pet. 27 ("this Court should grant the petition for a writ of certiorari"). By failing to provide any substantive argument for mandamus relief, petitioner abandoned the claim. *See, e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994).

Even if there was no waiver, petitioner would not be entitled to mandamus relief. "Mandamus is an extraordinary remedy, available only in rare cases." *Roberts v. United States Dist. Court*, 339 U.S. 844, 845 (1950) (per curiam). Only a "judicial usurpation of power will justify the invocation of" mandamus relief. *Will v. United States*, 389 U.S. 90, 95 (1967) (quotation omitted). The losing party's opinion that the decision below was erroneous does not satisfy this demanding standard. *Id.* at 98 n.6. The petitioner must also demonstrate that it has no

other adequate means to attain the desired relief. *Kerr v. United States*, 426 U.S. 394, 403 (1976).

For the same reasons discussed in *Mohawk*, petitioner cannot demonstrate that it meets the standards for mandamus. If petitioner feels aggrieved at the end of this lawsuit, it can pursue a direct appeal. *See* 130 S.Ct. at 606-07. The interlocutory review petitioner seeks is simply unwarranted.

CONCLUSION

The petition for a writ of certiorari and/or mandamus should be denied.

Respectfully submitted,

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